

ENGROSSED

## Senate Bill No. 386

(By Senators Unger, Browning, Snyder,  
Kessler (Mr. President) and Palumbo)

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[Introduced January 23, 2012; referred to  
the Committee on the Judiciary; and then to  
the Committee on Finance.]

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A BILL to amend and reenact §11-24-13f of the Code of West Virginia, 1931, as amended, relating to taxation of water's-edge corporations; and providing for clarification of the entities to be included in a water's-edge group for corporation net income tax purposes.

*Be it enacted by the Legislature of West Virginia:*

That §11-24-13f of the Code of West Virginia, 1931, as amended, be amended and reenacted to read as follows:

**ARTICLE 24. CORPORATION NET INCOME TAX.**

**§11-24-13f. Water's-edge reporting mandated absent affirmative election to report based on worldwide unitary combined reporting basis; initiation and withdrawal of worldwide combined reporting election.**

1       (a) *Water's-edge reporting.* —

2       Absent an election under subsection (b) of this section to  
3 report based upon a worldwide unitary combined reporting  
4 basis, taxpayer members of a unitary group shall determine  
5 each of their apportioned shares of the net business income  
6 or loss of the combined group on a water's-edge unitary  
7 combined reporting basis. In determining tax under this  
8 article and article twenty-three of this chapter on a water's-  
9 edge unitary combined reporting basis, taxpayer members  
10 shall take into account all or a portion of the income and  
11 apportionment factors of only the following members  
12 otherwise included in the combined group pursuant to  
13 section thirteen-a of this article:

14       (1) The entire income and apportionment factors of any  
15 member incorporated in the United States or formed under  
16 the laws of any state, the District of Columbia or any  
17 territory or possession of the United States;

18       (2) The entire income and apportionment factors of any  
19 member, regardless of the place incorporated or formed, if  
20 the average of its property, payroll and sales factors within  
21 the United States is twenty percent or more;

22       (3) The entire income and apportionment factors of any  
23 member which is a domestic international sales corporation  
24 as described in Internal Revenue Code Sections 991 to 994,  
25 inclusive; a foreign sales corporation as described in Internal  
26 Revenue Code Sections 921 to 927, inclusive; or any member  
27 which is an export trade corporation, as described in  
28 Internal Revenue Code Sections 970 to 971, inclusive;

29       (4) Any member not described in subdivision (1), (2) or (3)  
30 of this subsection shall include its business income which is  
31 effectively connected, or treated as effectively connected  
32 under the provisions of the Internal Revenue Code, with the  
33 conduct of a trade or business within the United States and,  
34 for that reason, subject to federal income tax;

35       (5) Any member that is a “controlled foreign corpora-  
36 tion”, as defined in Internal Revenue Code Section 957, to  
37 the extent of the income of that member that is defined in  
38 Section 952 of Subpart F of the Internal Revenue Code  
39 (Subpart F income) not excluding lower-tier subsidiaries’

40 distributions of such income which were previously taxed,  
41 determined without regard to federal treaties, and the  
42 apportionment factors related to that income; any item of  
43 income received by a controlled foreign corporation shall be  
44 excluded if such income was subject to an effective rate of  
45 income tax imposed by a foreign country greater than ninety  
46 percent of the maximum rate of tax specified in Internal  
47 Revenue Code Section 11;

48 (6) Any member that earns more than twenty percent of  
49 its income, directly or indirectly, from intangible property or  
50 service-related activities that are deductible against the  
51 business income of other members of the water's-edge group,  
52 to the extent of that income and the apportionment factors  
53 related thereto: Provided, That for purposes of this subdivi-  
54 sion, if a corporation organized outside of the United States  
55 is included in a water's- edge combined group pursuant to  
56 this subdivision, and has an item of income that is exempt  
57 from United States federal income tax pursuant to the  
58 mandate of a comprehensive income tax treaty qualified  
59 under Internal Revenue Code Section 1(h)(11), that corpora-  
60 tion shall be considered to be included in the combined  
61 group under this subdivision only with regard to any items

62 of income described in this subdivision that are not so  
63 exempt, taking into account items of expense and apportion-  
64 ment factors associated with such items of nonexempt  
65 income. Nothing in this subdivision prevents the Tax  
66 Commissioner from adjusting, under any provision of this  
67 article, any deduction claimed by the payer for amounts that  
68 are excluded from the combined group's taxable income  
69 under this subdivision. The Tax Commissioner may require  
70 the reporting of the amounts of such excluded income and  
71 the documentation of any claimed treaty exemption as  
72 conditions to be met by a payer claiming a deduction of such  
73 payments. The Tax Commissioner may issue such legislative,  
74 procedural or emergency rules as the Tax Commissioner may  
75 deem necessary for the administration of this section; and

76 (7) The entire income and apportionment factors of any  
77 member that is doing business in a tax haven defined as  
78 being engaged in activity sufficient for that tax haven  
79 jurisdiction to impose a tax under United States Constitu-  
80 tional standards. If the member's business activity within a  
81 tax haven is entirely outside the scope of the laws, provisions  
82 and practices that cause the jurisdiction to meet the criteria  
83 set forth in the definition of a tax haven, the activity of the

84 member shall be treated as not having been conducted in a  
85 tax haven.

86 (b) *Initiation and withdrawal of election to report based*  
87 *on worldwide unitary combined reporting.* —

88 (1) An election to report West Virginia tax based on  
89 worldwide unitary combined reporting is effective only if  
90 made on a timely filed, original return for a tax year by every  
91 member of the unitary business subject to tax under this  
92 article. The Tax Commissioner shall develop rules governing  
93 the impact, if any, on the scope or application of a worldwide  
94 unitary combined reporting election, including termination  
95 or deemed election, resulting from a change in the composi-  
96 tion of the unitary group, the combined group, the taxpayer  
97 members and any other similar change.

98 (2) The election shall constitute consent to the reasonable  
99 production of documents and taking of depositions in  
100 accordance with the provisions of this code.

101 (3) In the discretion of the Tax Commissioner, a world-  
102 wide unitary combined reporting election may be disre-  
103 garded, in part or in whole, and the income and apportion-  
104 ment factors of any member of the taxpayer's unitary group  
105 may be included in or excluded from the combined report

106 without regard to the provisions of this section, if any  
107 member of the unitary group fails to comply with any  
108 provision of this article.

109 (4) In the discretion of the Tax Commissioner, the Tax  
110 Commissioner may mandate worldwide unitary combined  
111 reporting, in part or in whole, and the income and apportion-  
112 ment factors of any member of the taxpayer's unitary group  
113 may be included in or excluded from the combined report  
114 without regard to the provisions of this section, if any  
115 member of the unitary group fails to comply with any  
116 provision of this article or if a person otherwise not included  
117 in the water's-edge combined group was availed of with a  
118 substantial objective of avoiding state income tax.

119 (5) A worldwide unitary combined reporting election is  
120 binding for and applicable to the tax year it is made and all  
121 tax years thereafter for a period of ten years. It may be  
122 withdrawn or reinstated after withdrawal, prior to the  
123 expiration of the ten-year period, only upon written request  
124 for reasonable cause based on extraordinary hardship due to  
125 unforeseen changes in state tax statutes, law or policy and  
126 only with the written permission of the Tax Commissioner.  
127 If the Tax Commissioner grants a withdrawal of election, he

128 or she shall impose reasonable conditions necessary to  
129 prevent the evasion of tax or to clearly reflect income for the  
130 election period prior to or after the withdrawal. Upon the  
131 expiration of the ten-year period, a taxpayer may withdraw  
132 from the worldwide unitary combined reporting election.  
133 Withdrawal must be made in writing within one year of the  
134 expiration of the election and is binding for a period of ten  
135 years, subject to the same conditions as applied to the  
136 original election. If no withdrawal is properly made, the  
137 worldwide unitary combined reporting election shall be in  
138 place for an additional ten-year period, subject to the same  
139 conditions as applied to the original election.

140 (c) For purposes of determining the tax imposed by  
141 article twenty-three of this chapter, the term “income”, as  
142 used in this section, shall be interpreted to mean the tax base  
143 or capital, as applicable, for purposes of the tax imposed  
144 under article twenty-three of this chapter.